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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1891

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

MICHAEL J. PAPRSKAR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Michael J. Paprskar, an inmate of the Texas Department of Corrections, respectfully moves pursuant to Rule 53 of the Court for leave to proceed in forma pauperis and to file the attached typewritten Brief in Opposition to the Petition for Certiorari in the above styled and numbered cause. The affidavit required by 28 U.S.C. section 1915 accompanies this motion.

Respectfully submitted,

MICHAEL ANTHONY MANESS
2260 Two Shell Plaza
Houston, Texas 77002
(713) 224-8900

Counsel for Petitioner

IN THE

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OCTOBER TERM, 1979

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AFFIDAVIT IN SUPPORT OF THE MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Michael J. Paprskar, being first duly sworn according to law, depose and state in support of my motion for leave to proceed in forma pauperis that I am the Respondent in the above styled and numbered cause; that I am presently an inmate of the Texas Department of Corrections and am unable to pay the fees or costs of this proceeding or to give security therefor, and that I believe I am entitled to redress.

I am executing this affidavit pursuant to 28 U.S.C. section 1915 to accompany my Brief in Opposition to the petition for certiorari in this cause. The matters stated herein are true and correct.

Michael J. Paprskar

MICHAEL J. PAPRSKAR

THE STATE OF TEXAS

COUNTY OF WALKER

BEFORE ME, the undersigned authority, on this day personally appeared MICHAEL J. PAPRSKAR, who being by me first duly sworn deposed and stated under oath that he has signed the foregoing affidavit and that the matters stated therein are true and correct.

SUBSCRIBED TO AND SWORN BEFORE ME, a notary public, on this 16 day of June, 1980.

Richard Calgrove

NOTARY PUBLIC IN AND FOR
WALKER COUNTY, TEXAS

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RESPONDENT'S BRIEF IN OPPOSITION

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June 1980

IN THE

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OCTOBER TERM, 1979

W. J. ESTELLE, JR., Director,
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PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Michael J. Paprskar, an inmate of the Texas Department of Corrections, respectfully suggests that the petition for a writ of certiorari in this cause, seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit, should be denied.

STATEMENT OF THE CASE

As the opinion of the Court of Appeals reveals, 612 F.2d 1003 (5 Cir., 1980), the Petitioner's hyperbolic characterization of this litigation as a "classic case of abusive piecemeal litigation by a state prisoner" is preposterous. The case in reality is no more than an unremarkable effort by a Federal habeas corpus petitioner to secure a hearing on substantial constitutional claims, a hearing thus far short-circuited by an unwarranted delay of more

than eighteen months as the result of a mechanical, impressionistic invocation of Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

What actually happened is simply stated. In December 1975 Paprskar filed a pro se Federal habeas corpus application in the Southern District of Texas, attacking not his conviction and 20-year sentence but an allegedly unconstitutional deprivation of "good time" credit for a substantial period of pretrial detention resulting from his successful appeal of a previous unconstitutional conviction and sentence of death. Paprskar v. State, 484 S.W.2d 731 (Tex.Cr.App., 1972). In January 1976 the District Court appointed Michael Maness under the provisions of the Criminal Justice Act of 1964, 18 U.S.C. section 3006A, to represent Paprskar in this "good time" case.

With the assistance of his family, Paprskar had previously retained another Houston attorney, Richard Prinz, to pursue State and Federal post-conviction remedies in connection with alleged constitutional defects in his conviction and sentence. However, it was not until March 1976, after substantial delay, that Mr. Prinz filed on Paprskar's behalf a State post-conviction application under Art. 11.07, Tex.C.Cr.P., asserting a number of claims but omitting a claim that Paprskar had expressly directed him to include -- that Paprskar's trial attorney had rendered constitutionally ineffective assistance of counsel. While this application languished in the State courts, the Federal District Court conducted an evidentiary hearing on Paprskar's "good time" claim and ultimately granted the relief sought in September 1976. One month later, the State convicting court denied the Prinz post-conviction application, but it was not until November 1977 -- more than one year later -- that the application was finally denied by the Court of Criminal Appeals of Texas, thereby exhausting State remedies on those claims Prinz had asserted on behalf of his client.

The State appealed the "good time" case to the Fifth Circuit. During the pendency of that appeal, in May 1977, Maness filed on Paprskar's behalf a second State post-conviction application, asserting the constitutional claim that Prinz had previously omitted and amplifying upon the others.[1/] This second post-conviction application was denied by the convicting court in July 1977 and by the Court of Criminal Appeals of Texas in September 1977.

In February 1978 the Fifth Circuit reversed the District Court's decision in the "good time" case. Paprskar v. Estelle, 566 F.2d 122 (5 Cir., 1978), cert. denied, 439 U.S. 843 (1978). While Maness was preparing and filing a petition for certiorari seeking review of this judgment,[2/] Paprskar filed in April 1978 a pro se Federal habeas corpus application containing essentially those claims alleged in the last State post-conviction application. Paprskar's pro se filing was attributable exclusively to the frustrations he had previously experienced when the inaction of counsel delayed his efforts to secure relief.

In its response in the second case the State asserted that this was a "second or successive petition" within the intendment of Rule 9(b) of the Rules Governing Section 2254 Cases in the

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1/ The claims were that (i) Paparskar's trial counsel had failed to render constitutionally effective assistance of counsel; (ii) a substantial factual basis for doubting Paprskar's mental competence to stand trial or to plead guilty was known to his lawyer, who failed either to apprise the trial court of those circumstances or to request a hearing on the question; (iii) trial counsel had refused to assert or argue a substantial claim that Paprskar's constitutional right to a speedy trial had been violated; (iv) trial counsel had acquiesced in open court to evidentiary stipulations that he knew to be factually untrue; and (v) trial counsel had permitted a "pre-plea" interview between Paprskar and the prosecutor, during which the prosecutor, in the presence of defense counsel, threatened and coerced Paprskar into pleading guilty, in part by misrepresentations of fact concerning the State's case that were materially untrue and that were known to be materially untrue by both the prosecutor and defense counsel.

2/ The Fifth Circuit's policy is to require counsel appointed under the Criminal Justice Act to prepare and file a petition for certiorari at the request of an indigent litigant if the issues for which review is sought are non-frivolous.

United States District Courts and constituted an abuse of the writ because Paprskar "should have submitted in his initial federal habeas corpus application [the "good time" case] all of the issues of which he is now complaining" (R. 15). The State did not advert even in passing to the circumstance that the Federal claims Paprskar "should have submitted in his initial federal habeas corpus application" were not decided adversely to him by the Texas trial and appellate courts until one year after the Federal District Court's decision in the "good time" case. In October 1978 the United States Magistrate, again without the slightest reference to the doctrine of exhaustion of state remedies, recommended to the District Court that the case be dismissed under Rule 9(b) on the theory that the Federal claims then before the Court should have been presented in the "good time" case and that "this is a classic case of abuse of the writ" (R. 53). The District Court followed this recommendation and dismissed the petition.

Upon learning of this dismissal, Mr. Maness prosecuted the appeal to the Fifth Circuit which has led to the filing of this petition for certiorari.

REASONS FOR DENYING THE WRIT

This case stands as a pathetic testament to the procedural peccadillos and resultant delays an indigent Federal habeas corpus petitioner is likely to encounter in attempting to vindicate Federal constitutional rights. After being provided by a United States District Judge with a court-appointed lawyer who declines to assert unexhausted constitutional claims in Federal habeas corpus action No. 1, Paprskar is then curtly advised by the same United States District Judge in Federal habeas corpus action No. 2 that review of substantial constitutional issues is now forever foreclosed because Paprskar (who through the familiar fiction of attributing a lawyer's actions to his client has now somehow become personally

culpable) has failed to present those issues in the first proceeding -- and has thereby "abused the writ" -- notwithstanding the fact that such issues had not been resolved by the Texas courts until after the first habeas corpus action had been decided by the Federal District Court.

Certiorari should be denied because this is a frivolous petition, presenting no substantial question for review.

First, the opinion of the Court of Appeals is obviously correct. Rule 9(b) is little more than a codification of the holding of Sanders v. United States, 373 U.S. 1, 17-18 (1963) that a second application for post-conviction relief may be denied by a Federal District Court if a prisoner "deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason * * *" (emphasis added). Neither Sanders nor Rule 9(b) prescribes the rule for which the State is apparently contending: blind dismissal of every "second or successive" Federal habeas corpus application filed by a State prisoner, irrespective of the justification offered or the underlying facts of the case. Unless every such application is automatically to be characterized as an "abuse of the writ" and consigned to oblivion, a reasonable explanation for a failure to assert all constitutional claims in one Federal habeas corpus proceeding should continue to be sufficient to preclude the application of Rule 9(b). Such an explanation has, of course, been offered by Paparskar and accepted by the Court of Appeals in this case.

Secondly, the State's explanation for what Paprskar and his court-appointed counsel should have done in this case (i.e., dismissed the "good-time" case and awaited the exhaustion of state remedies on all other constitutional claims attacking the underlying conviction and sentence) is singularly unpersuasive. As the Court

of Appeals pointed out, "[t]he simple fact is that the 'good time' case was ripe for adjudication and the claims challenging the underlying conviction were not." 612 F.2d at 1006-1007. To adopt the State's position would be to establish an inflexible, unchallengable rule that would severely and unjustifiably cripple a United States District Court's ability to hear and decide those constitutional controversies that are ready to be decided and that ought to be decided.[3/]

Finally, even assuming that the State's interpretation of Rule 9(b) were to be accepted, its application to this case, in circumstances in which neither Paprskar nor his counsel had any reason to foresee that the withholding of unexhausted constitutional claims might later risk involuntary relinquishment of them, would plainly offend due process. Cf. Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964). The ultimate and unalterable fact of this case is that Paprskar and his counsel did not intend to abuse the writ of habeas corpus and could not reasonably have anticipated that the State would later contend that they did. That circumstance by itself is sufficient reason for not attempting to write a novel principle of Federal habeas corpus law into this proceeding.[4/]

It is supremely ironic that the State has sought to reinforce its view that the Federal Courts are being inundated by a flood of abusive, successive, frivolous prisoner petitions by referring to the example of Albert H. Cater (Petition for Certiorari,

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3/ The Fifth Circuit sitting en banc in Galtieri v. Wainwright, 582 F.2d 348(5 Cir., 1978) has already impliedly rejected the position now asserted by the State. 582 F.2d at 374 (dissenting opinion). This decision presumably accounts for the State's failure to seek rehearing en banc in this case, a tactical maneuver of the sort it is so quick to condemn in its petition for certiorari.

4/ The non-final character of the Fifth Circuit's judgment remanding the case is equally significant. See R. Stern & E. Gressman, Supreme Court Practice 300-302 (5th Ed., 1978).

Cody v. Missouri Board of Probation and Parole, 468 F. Supp. 431 (W.D. Mo. W.D., 1979), a case the State claims is "precisely identical to this one" (Petition for Certiorari, p. 9) is not. Cody "[waited] to exhaust state remedies and present other claims to the federal court until after the first petition had been determined * * *." 468 F. Supp. at 435. Paprskar did not.

p. 11). Properly characterized as "one who is unquestionably the most litigious prisoner in the Southern District of Texas," Carter v. Telectron, Inc., 452 F. Supp. 944, 946 (S.D. Tex., 1977), Carter's most recent of many Federal habeas corpus petitions was granted by a United States District Judge in Houston, who found that his retrial and conviction as an habitual criminal constituted double jeopardy because his initial conviction had been reversed for insufficiency of the evidence. See also Sellars v. Estelle, 450 F. Supp. 1262 (S.D. Tex., 1978), aff'd, 591 F.2d 1208 (5 Cir., 1979), rehearing denied, 594 F.2d 863, in which a "litigious" petitioner who spent 14 years in prison -- seven on Death Row -- for a crime he contended he did not commit was finally granted Federal habeas corpus relief because a police officer admitted his testimony at trial was perjurious and that a purportedly "voluntary" confession was the product of threatening the prisoner with death. These cases, which are by no means isolated, dramatically reveal the extent to which "second or successive" Federal habeas corpus petitions become, not an abuse of the writ, but an important and necessary vehicle for correcting violations of Federal constitutional rights that have previously gone unremedied. They also reveal the moral and intellectual bankruptcy of the State's position that "[m]ultiple habeas corpus petitions from a single state prisoner are a luxury than can no longer be afforded by the federal district courts" (Petition for Certiorari, p. 10).

CONCLUSION

Respondent Michael J. Paprskar respectfully suggests that the petition for certiorari in this cause should be denied.

Respectfully submitted,

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